

1 13. While camping, Plaintiffs regularly light wood campfires in the evenings. Up
2 until April 21, 2006, Mr. Shalaby typically ignited the family's campfires by using his
3 BernzOmatic MAPP Gas torch to ignite the firewood. Mr. Shalaby stored the torch in a wooden
4 box, along with the auxiliary MAPP Gas canisters, which Plaintiffs kept inside of their
5 recreational vehicle.

6 14. The MAPP Gas torch kit contained a written representation that, among other
7 things, one of the intended and/or acceptable uses of the torch was for "lighting grills." By
8 making this representation, BernzOmatic intended for consumers to use its MAPP Gas torches to
9 start cooking and/or recreational campfires, and knew or should have known that some
10 consumers would use its torches in the manner that Mr. Shalaby used his torch at the time of the
11 incident which is the subject of this lawsuit, as set forth in more detail herein below.

12 15. Neither the torch nor the MAPP Gas cylinder contained a warning against using
13 the torch to ignite a wood campfire.

14 16. Defendants and each of them at all times herein mentioned knew and intended
15 that the BernzOmatic Brand MAPP Gas torches that they designed, manufactured, marketed and
16 sold would be purchased and used by consumers without the requisite knowledge of what
17 constitutes material defects in the product, and thus without inspection for defects therein or in
18 any of its component parts.

19 17. The MAPP Gas torch and/or cylinder at issue in this case was, at the time Mr.
20 Shalaby purchased it, defective and unsafe for its intended purposes in that the design,
21 manufacture and/or workmanship of the torch or its component parts were such that, without any
22 misuse of or abuse to the product on the part of the user, the contents of the cylinder allowed to
23 discharge instantaneously and become ignited upon activation of the torch ignition switch.

24 18. Between the date on which he purchased the MAPP Gas torch kit and April 21,
25 2006, Mr. Shalaby used the torch to ignite campfires on many occasions.
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28

1 **A. The Incident**

2 19. During the week of April 17, 2006, Plaintiffs were vacationing at the "Campland
3 on the Bay" recreational vehicle resort, located at 2211 Pacific Beach Drive in San Diego,
4 California.

5 20. On or about the evening of April 21, 2006, Mr. Shalaby was seriously injured
6 when he activated the trigger switch on his BernzOmatic MAPP Gas torch in order to light a
7 wood campfire in a designated campfire pit, located within the campsite at the Campland
8 complex where Plaintiffs were staying. Mr. Shalaby activated the trigger switch on the torch
9 when the MAPP Gas cylinder suddenly, instantaneously, and without warning, exploded and/or
10 discharged its contents, which caught fire. The heated MAPP Gas and fire enveloped Mr.
11 Shalaby, and caused severe burns to his face, limbs, and extremities.

12 **B. Ms. Dunn-Ruiz Witnessed the Incident**

13 21. Ms. Dunn-Ruiz was less than ten feet away from Mr. Shalaby when the
14 BernzOmatic cylinder exploded and/or instantaneously discharged its contents and enveloped
15 Mr. Shalaby in heated MAPP Gas and fire. While she had her back turned to her husband at the
16 moment the explosion and/or gas discharge occurred, Ms. Dunn-Ruiz heard the noise from the
17 explosion and/or gas discharged, and turned around within seconds to see her husband enveloped
18 in flames.

19 **C. Plaintiffs' Damages**

20 22. Mr. Shalaby was confined to a hospital for approximately three weeks after the
21 incident of April 21, 2006 involving the BernzOmatic torch and MAPP Gas cylinder, receiving
22 medical treatment for his injuries, including but not limited to painful skin grafts and surgeries,
23 as well as treatments for infections and other medical complications that were proximately
24 caused by the incident. Mr. Shalaby was bedridden for several weeks thereafter. During his
25 time in the hospital, Mr. Shalaby incurred in excess of \$300,000 in medical expenses, and he
26 continues to incur medical substantial expenses in connection with ongoing medical treatment
27 for his injuries.
28

1 23. At all times mentioned herein, Mr. Shalaby was and remains a self-employed
2 attorney at law with an active litigation practice. During the time he was confined to the
3 hospital, Mr. Shalaby was unable to work and, as a result, lost a substantial amount of income.
4 Since being discharged from the hospital, Mr. Shalaby's ability to resume his law practice has
5 been limited due to the physical and emotional injuries he sustained as a result of the April 21,
6 2006 incident involving the BernzOmatic torch and MAPP Gas cylinder. Mr. Shalaby was
7 recently able to resume practicing law on a limited basis, but he continues to lose a substantial
8 amount of business and income due to his limited ability to practice law on a full time basis. Mr.
9 Shalaby will continue to lose income as a result of the injuries he sustained from the
10 BernzOmatic MAPP Gas torch for an indefinite period of time.

11 24. Mr. Shalaby has suffered mental anguish and emotional injuries as a result of the
12 April 21, 2006 incident with the BernzOmatic torch and MAPP Gas cylinder, including but not
13 limited to Post Traumatic Stress Disorder, for which he has sought treatment. Mr. Shalaby has
14 incurred, and continues to incur, out-of-pocket expenses for the treatment of his emotional
15 injuries.

16 25. Ms. Dunn-Ruiz has suffered mental anguish and emotional injuries as a result of
17 witnessing her husband burn as a result of the April 21, 2006 incident with the BernzOmatic
18 torch and MAPP Gas cylinder while standing in close proximity to her husband.

19
20 **FIRST CAUSE OF ACTION -- STRICT PRODUCTS LIABILITY**
21 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

22 26. Plaintiffs incorporate by this reference the allegations, and each of them,
23 contained in paragraphs 1 through 25 above, as though fully set forth herein.

24 27. At all times mentioned in this complaint, the BernzOmatic Brand MAPP Gas
25 torch and/or cylinder that caused Mr. Shalaby's injuries and/or its component parts, were
26 defective as to design, manufacture, and warnings, which caused the torch, cylinder and/or their
27
28

1 component parts to be in a dangerous and defective condition and prone to failure, which made
2 them unsafe for their intended use.

3 28. Plaintiffs are informed and believe that the torch and/or cylinder contained one or
4 more manufacturing defects when they left the possession of Irwin Industrial Tools, Home Depot
5 and/or DOES 2 through 100 (collectively "Defendants") in that the torch and/or cylinder differed
6 from the intended design and specifications, and/or from other typical units of the same product
7 line.

8 29. Plaintiffs are further informed and believe that the design of the BernzOmatic
9 torch and/or MAPP Gas cylinder that caused Mr. Shalaby's injuries was defective because the
10 torch and/or cylinder did not perform as safely as an ordinary consumer would have expected
11 them to perform when used in the manner that Mr. Shalaby did at the time of the April 21, 2006
12 incident which is the subject of this case.

13 30. Defendants, and each of them, designed, manufactured, distributed, marketed
14 and/or sold the torch and cylinder, and the torch and/or cylinder contained one or more
15 manufacturing and/or design defects when they left Defendants' possession.
16

17 31. As a direct and proximate result of the defective and dangerous condition of torch,
18 cylinder and/or their component parts as described above, Mr. Shalaby sustained the following
19 serious injuries and damages from using the torch in an intended manner:
20

21 a. Deep burns over 22% of his body surface, including his face, hands, arms
22 and legs, requiring surgical repair, skin grafts and continuing medical treatment;
23

24 b. physical pain and discomfort;

25 c. immobility;

26 d. disfigurement;

27 e. lost wages; and
28

1 f. emotional trauma and mental anguish, including but not limited to Post
2 Traumatic Stress Disorder.

3 **SECOND CAUSE OF ACTION -- STRICT LIABILITY FOR FAILURE TO WARN**
4 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

5 32. Plaintiffs incorporate by this reference the allegations, and each of them,
6 contained in paragraphs 1 through 31 above, as though fully set forth herein.

7 33. The BernzOmatic torch and MAPP Gas cylinder that caused Mr. Shalaby's
8 injuries lacked sufficient instructions or warnings of the potential risk and danger that the
9 cylinder might suddenly and instantaneously discharge its contents and catch fire when used in
10 an intended and foreseeable manner.

11 34. This danger and risk were known or should have been known to Defendants at the
12 time the torch and MAPP Gas cylinder were designed, manufactured, distributed, marketed and
13 sold.

14 35. These risks presented a substantial danger to purchasers and users of the torch that
15 ordinary consumers would not have recognized or expected, particularly without an adequate
16 warning.

17 36. Mr. Shalaby was injured when he used the torch in a manner that was intended
18 and foreseeable to Defendants.

19 37. The lack of sufficient instructions or warnings was a substantial factor in causing
20 Mr. Shalaby's injuries.

21 **THIRD CAUSE OF ACTION -- NEGLIGENCE**
22 **(By Mr. Shalaby Against Irwin Industrial Tools)**

23 38. Plaintiffs incorporate by this reference the allegations, and each of them,
24 contained in paragraphs 1 through 37 above, as though fully set forth herein.

1 39. Irwin Industrial Tools, whose BernzOmatic division designed, manufactured,
2 distributed, marketed and/or sold the BernzOmatic Brand torch and MAPP Gas cylinder that
3 caused Mr. Shalaby's injuries.

4 40. Irwin Industrial Tools was negligent in designing and/or manufacturing the torch
5 and MAPP Gas cylinder in that they failed to use the amount of care in designing and/or
6 manufacturing the torch and cylinder that a reasonably careful designer and manufacturer would
7 use in similar circumstances to avoid exposing others to a foreseeable risk of harm.

8 41. Mr. Shalaby was harmed as a proximate result of Irwin Industrial Tools'
9 negligence when the BernzOmatic Brand MAPP Gas cylinder exploded and instantaneously
10 discharged its contents upon Mr. Shalaby's activation of the torch trigger switch.

11 42. The negligence of Industrial Tools' was a substantial factor in causing Mr.
12 Shalaby's injuries.

13
14 **FOURTH CAUSE OF ACTION – NEGLIGENT FAILURE TO WARN**
15 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

16 43. Plaintiffs incorporate by this reference the allegations, and each of them,
17 contained in paragraphs 1 through 42 above, as though fully set forth herein.

18 44. Defendants, and each of them, were negligent by not using reasonable care to
19 adequately warn or instruct consumer's about the dangerous condition(s) in the BernzOmatic
20 Brand MAPP Gas torch's and/or cylinder that caused Mr. Shalaby's injuries, or about
21 circumstances that are likely to make the consumer's use of the torch dangerous.

22 45. Defendants, and each of them, knew or reasonably should have known that the
23 torch presented an unreasonable danger of exploding, or was likely to explode, when used in a
24 reasonably foreseeable manner.
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1 46. Defendants knew or reasonably should have known that users of the torch would
2 not realize this danger, yet failed to adequately warn of the danger or instruct users on the safe
3 use of the torch to prevent the type of injuries that Mr. Shalaby has sustained.

4 47. A reasonable designer, manufacturer, marketer, distributor and seller would have
5 warned of this danger, or instructed users on the safe use of the torch, to prevent that type of
6 injuries that Mr. Shalaby has sustained.

7 **FIFTH CAUSE OF ACTION – BREACH OF IMPLIED WARRANTY OF**
8 **MERCHANTABILITY**

9 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

10 48. Plaintiffs incorporate by this reference the allegations, and each of them,
11 contained in paragraphs 1 through 47 above, as though fully set forth herein.

12 49. Mr. Shalaby was proximately harmed by the BernzOmatic Brand torch and
13 MAPP Gas cylinder used in the April 21, 2006 incident because the torch and cylinder did not
14 have the qualities, reliability and safety that a reasonable consumer would expect.

15 50. At the time he purchased the torch, Defendants were in the business of selling
16 BernzOmatic Brand torches and MAPP Gas cylinders.

17 51. The BernzOmatic torch and MAPP Gas cylinder that caused Mr. Shalaby's
18 injuries were not of the same quality as those generally acceptable in the industry, and were not
19 fit for the ordinary purposes for which such products are used.

20 52. The failure of the torch to have the expected quality that it should have had was a
21 substantial factor in causing Mr. Shalaby's injuries.
22

23 **SIXTH CAUSE OF ACTION –**
24 **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

25 **(By Plaintiffs Against All Defendants)**

26 53. Plaintiffs incorporate by this reference the allegations, and each of them,
27 contained in paragraphs 1 through 52 above, as though fully set forth herein.
28

1 54. Defendants, and each of them, were negligent in designing, manufacturing,
2 distributing and selling the defective BernzOmatic Brand torch and MAPP Gas cylinder that
3 caused Mr. Shalaby's injuries.

4 55. Ms. Dunn-Ruiz was present at the scene of the April 21, 2006 incident involving
5 the explosion and/or instantaneous discharge of the contents of the MAPP Gas cylinder in Mr.
6 Shalaby's hands, when it occurred, and was aware at the time that her husband was sustaining
7 severe and life threatening injuries.

8 56. Both Mr. Shalaby and Ms. Dunn-Ruiz suffered serious emotional distress as a
9 result of experiencing and observing the April 21, 2006 incident, respectively, including severe
10 mental suffering, grief, anguish, anxiety, depression, worry, shock, and in the case of Mr.
11 Shalaby, Post Traumatic Stress Disorder.

12 57. The negligence of Defendants in designing, manufacturing, distributing,
13 marketing and selling the defective torch and/or MAPP Gas cylinder was a substantial factor in
14 causing Plaintiffs' serious emotional distress.
15

16 Wherefore, Plaintiffs DEMAND A JURY TRIAL, and pray that a judgment be entered
17 against Defendants, and each of them, as follows:
18

19 1. For general damages, including but not limited to damages for emotional distress,
20 pain and suffering, according to proof;

21 2. For special damages, including but not limited to out of pocket medical expenses
22 and incidental expenses related to Mr. Shalaby's injuries, and lost income, according to proof;

23 3. For exemplary damages;

24 4. For prejudgment interest according to law;

25 5. For costs of suit incurred in this action; and
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2 6. For any other and further relief that the court deems just and proper.
3

4 Dated: June 11, 2007

ALBORG, VEILUVA & EPSTEIN LLP

/s/

5 By: _____
6 MARK D. EPSTEIN
7 Attorneys for Plaintiffs
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EXHIBIT E

Case 3:06-cv-07026-EDL Document 38 Filed 06/19/2007 Page 1 of 12

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 Redondo Beach, California 90277-5600
 Telephone: (310) 540-1332

4
 5 Attorneys for Defendant and Third Party Plaintiff, BERNZOMATIC, an
 Unincorporated Division of Irwin Industrial Tool Company, and
 Defendant, THE HOME DEPOT, INC.

6
 7
 8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10

11 ANDREW SHALABY, an individual,)
 12 and SONIA DUNN-RUIZ, an)
 individual,)
 13 Plaintiffs,)

CASE NO. C 06 7026 EDL

Magistrate Judge Elizabeth D. LaPorte

v.

14 THIRD PARTY COMPLAINT ON
 15 BEHALF OF BERNZOMATIC, AN
 UNINCORPORATED DIVISION OF
 16 IRWIN INDUSTRIAL TOOL COMPANY

17 IRWIN INDUSTRIAL TOOL COMPANY,)
 18 THE HOME DEPOT, INC., and DOES)
 2 through 100, inclusive,)
 Defendants.)

BERNZOMATIC,

Cross-Complainant,

v.

22 WESTERN INDUSTRIES, INC.,)
 23 WORTHINGTON INDUSTRIES, AND)
 ROES 2 through 100, inclusive,)
 24 Cross-Defendants.)

25
 26
 27 For their Third Party Complaint against the Third Party
 28 Defendants, Defendant/Third Party Plaintiff, Bernzomatic, an

Case 3:06-cv-07026-EDL Document 38 Filed 06/19/2007 Page 2 of 12

1 Unincorporated Division of Irwin Industrial Tool Company
2 (hereinafter Bernzomatic), states as follows:

3 PARTIES

4 1. Defendant/Third Party Plaintiff, Bernzomatic, is a
5 Delaware corporation, with its principal place of business in
6 North Carolina.

7 2. Third Party Defendant, Western Industries, Inc., is a
8 closely-held corporation with its principal place of business in
9 Wisconsin.

10 3. Third Party Defendant, Worthington Industries, Inc., is
11 an Ohio corporation with its principal place of business in Ohio.

12 4. At various times, both Western and Worthington
13 manufactured and sold BernzOmatic-branded MAPP gas cylinders.

14 5. Worthington purchased Western's cylinder business in
15 September 2004.

16 JURISDICTION AND VENUE

17 6. Subject matter jurisdiction is proper in this Court
18 because federal district courts in California recognize the rights
19 of Third Party Complainant to Declarations of Rights, Breach of
20 Contract Claims, Contractual Indemnity, Common Law Indemnity and
21 Punitive Damages. This Court has Personal Jurisdiction over the
22 Third Party Defendants under the California long-arm statute as
23 the actions or failures to act by the Third Party Defendants
24 caused damage to the Defendant/Third Party Plaintiff and gave rise
25 to claims in California.

26 7. Venue is proper in this Court because all of the
27 Plaintiffs' litigation claims arose in this jurisdiction, and all
28 of the Third Party Complaint claims are derivative of those

Case 3:06-cv-07026-EDL Document 38 Filed 06/19/2007 Page 3 of 12

1 litigation claims.

2 FACTUAL ALLEGATIONS

3 8. Defendant/Third Party Plaintiff, Bernzomatic, has been
4 named as a Defendant in the above-captioned lawsuit (the "Shalaby
5 litigation"). Plaintiffs filed suit on October 10, 2006 and
6 recently amended their Complaint on June 11, 2007.

7 9. The Joint Case Management Statement and Order entered on
8 February 20, 2007 alleges that Plaintiff, Andrew Shalaby, suffered
9 burns to his face and extremities due to an accident involving a
10 Bernzomatic-branded MAPP gas cylinder that he used to light a
11 campfire. It further alleges that liquid MAPP gas inside the
12 pressurized cylinder absorbed energy from the surrounding fire and
13 heated up such that it vaporized causing the cylinder to produce
14 "an explosive effect."

15 10. The Joint Case Management Statement and Order entered on
16 February 20, 2007 states that fire department personnel who
17 responded during the incident instructed the onsite manager to
18 discard the product. Depositions of fire department and onsite
19 personnel were taken on April 17, 2007 confirming that the product
20 had been discarded.

21 11. Third Party Defendants, Western and Worthington,
22 manufactured MAPP gas cylinders, such as the one allegedly
23 involved in this action.

24 12. Defendant/Third Party Plaintiff purchased MAPP gas
25 cylinders exclusively from Western and Worthington during the time
26 periods relevant to this action.

27 13. To the extent that a Bernzomatic-branded MAPP gas
28 cylinder was involved in the accident which forms the basis of

Case 3:06-cv-07026-EDL Document 38 Filed 06/19/2007 Page 4 of 12

1 Plaintiffs' Complaint against Bernzomatic and Home Depot, said
2 MAPP gas cylinder was manufactured by either Western or
3 Worthington.

4 14. Defendant/Third Party Plaintiff cannot determine whether
5 Western or Worthington manufactured the MAPP gas cylinder involved
6 because the fire department personnel who responded during the
7 incident instructed the onsite manager to discard the product and
8 it cannot be recovered.

9 15. Upon information and belief, the written contract
10 between Worthington and Western regarding the sale of the cylinder
11 business in September 2004 contains an express provision setting
12 forth a method to facilitate identification of a cylinder's
13 manufacturer if it cannot be determined by a serial number or
14 other reliable information.

15 FIRST CLAIM - DECLARATION OF RIGHTS

16 16. Defendant/Third Party Plaintiff incorporates by
17 reference the allegations in Paragraphs 1 through 15 of this Third
18 Party Complaint as if fully rewritten herein.

19 17. Exclusive Supply Agreements between Newell Operating
20 Company (a predecessor to Industrial Tool Company, dba
21 Bernzomatic) and Western in 2001, as well as between Irwin
22 Industrial Tool Company, dba Bernzomatic, and Worthington in 2006
23 for Western's and Worthington's MAPP gas cylinders included
24 indemnification provisions. In September 2004, Worthington
25 assumed the rights and obligations of Western under the 2001
26 Supply Agreement resulting from Worthington's purchase of
27 Western's cylinder business at that time.

28 18. The indemnification provision at page 10 of the

1 Agreement between Newell (Bernzomatic) and Western states, in
2 pertinent part:

3 "Western assumes and agrees to indemnify, defend and
4 hold harmless Newell and its affiliates, directors,
5 officers, employees and agents for all claims against
6 Newell for personal injury or property damage to the
7 extent such injury or damage is alleged to be caused by
8 or is caused by the sale or distribution of Covered
9 Cylinders supplied under this Agreement that were not
10 suitable for sale, distribution or use due to the
11 design, manufacture, labeling or failure to label, or
12 storage prior to delivery to Newell of such Covered
13 Cylinders. Western further agrees to indemnify, defend
14 and hold harmless Newell and its affiliates, directors,
15 officers, employees and agents for all claims against
16 Newell resulting from the failure to manufacture
17 products in accordance with applicable laws including
18 environmental and labor laws."

19 19. The indemnification provision at page 8 of the Agreement
20 between Irwin Industrial Tool Company (Bernzomatic) and
21 Worthington states, in pertinent party:

22 "WCW [Worthington] assumes and agrees to indemnify,
23 defend and hold harmless BernzOmatic and its customers,
24 affiliates, directors, officers, employees and agents
25 for all claims against BernzOmatic for personal injury
26 or property damage to the extent such injury or damage
27 is alleged to be cause[d] by or is caused by in whole or
28 in part the sale or distribution of Covered Cylinders

1 supplied under this Agreement that were not suitable for
2 sale, distribution or use due to the design,
3 manufacture, labeling or failure to label (except as
4 provided in Section 4.4), or storage prior to delivery
5 to BernzOmatic of such Covered Cylinders. WCW further
6 agrees to indemnify, defend and hold harmless
7 BernzOmatic and its affiliates, directors, officers,
8 employees and agents for all claims against BernzOmatic
9 resulting from the failure to manufacture products in
10 accordance with applicable laws.

11 20. The allegations in the Shalaby litigation are for
12 personal injury caused by the sale or distribution of covered
13 cylinders - (a Bernzomatic-branded MAPP gas cylinder) -
14 manufactured and sold by Western and Worthington pursuant to the
15 Supply Agreements, which contained the above-cited indemnification
16 provisions.

17 21. Pursuant to the indemnification provisions, Bernzomatic
18 tendered its defense and indemnification to Western on June 19,
19 2006, and to Worthington on January 24, 2007.

20 22. To date, Western has neither defended nor indemnified
21 Bernzomatic, which is a breach of the indemnification provision in
22 the Supply Agreement.

23 23. To date, Worthington, has neither defended nor
24 indemnified Bernzomatic, which is a breach of the indemnification
25 provision in the Supply Agreement.

26 24. An actual dispute exists between Defendant/Third Party
27 Plaintiff and Plaintiffs, Andrew Shalaby and Sonia Dunn-Ruiz.

28 25. Bernzomatic is entitled to a declaration of rights under

Case 3:06-cv-07026-EDL Document 38 Filed 06/19/2007 Page 7 of 12

1 the contracts against Western and Worthington and the obligations
2 under the indemnification provisions of the Supply Agreement as
3 follows:

4 a. Western is obligated under the indemnification
5 provisions of the Supply Agreement and by virtue of its breach of
6 its duty to defendant Bernzomatic in the Shalaby litigation, to
7 indemnify Bernzomatic with respect to the full amount of all
8 defense costs and any liability or settlement in the Shalaby
9 litigation without any cost sharing, apportionment between
10 particular claims or allegations, or limitation on amount.

11 b. Worthington is obligated under the indemnification
12 provisions of the Supply Agreement and by virtue of its breach of
13 its duty to defendant Bernzomatic in the Shalaby litigation, to
14 indemnify Bernzomatic with respect to the full amount of all
15 defense costs and any liability or settlement in the Shalaby
16 litigation without any cost sharing, apportionment between
17 particular claims or allegations, or limitation on amount.

18 SECOND CLAIM - BREACH OF CONTRACT/CONTRACTUAL INDEMNIFICATION

19 26. Defendant/Third Party Plaintiff incorporates by
20 reference the allegations in Paragraphs 1 through 25 of this
21 Complaint as if fully rewritten herein.

22 27. Western has breached its express and implied obligations
23 under the Supply Agreement because it has failed to defend and
24 indemnify Defendant/Third Party Plaintiff and hold it harmless
25 with respect to any of the amounts Defendant/Third Party Plaintiff
26 has incurred and will incur in the future because of the Shalaby
27 litigation.

28 28. Such breach of contract by Western has directly and

Case 3:06-cv-07026-EDL Document 38 Filed 06/19/2007 Page 8 of 12

1 proximately caused injury to Defendant/Third Party Plaintiff,
2 including, but not limited to, the payment of the entire cost of
3 the Shalaby litigation and the payment of fees and expenses in
4 defending the Shalaby litigation.

5 29. Worthington has breached its express and implied
6 obligations under the Supply Agreement because it has failed to
7 defend and indemnify Defendant/Third Party Plaintiff and hold it
8 harmless with respect to any of the amounts Defendant/Third Party
9 Plaintiff has incurred and will incur in the future because of the
10 Shalaby litigation.

11 30. Such breach of contract by Worthington has directly and
12 proximately caused injury to Defendant/Third Party Plaintiff,
13 including, but not limited to, the payment of the entire cost of
14 the Shalaby litigation and the payment of fees and expenses in
15 defending the Shalaby litigation.

16 THIRD CLAIM - EQUITABLE INDEMNIFICATION

17 31. Defendant/Third Party Plaintiff incorporates by
18 reference the allegations in Paragraphs 1 through 30 of this
19 Complaint as if fully rewritten herein.

20 32. Third Party Defendants, Western and Worthington,
21 manufactured Bernzomatic-branded MAPP gas cylinders and introduced
22 those cylinders into the stream of commerce by selling them to
23 Defendant/Third Party Plaintiff.

24 33. To the extent that the MAPP gas cylinder at issue is
25 held to be defective, which Defendant/Third Party Plaintiff
26 expressly denies, one of the Third Party Defendants, Western
27 and/or Worthington, introduced that defect by manufacturing and
28 selling MAPP gas cylinders to Defendant/Third Party Plaintiff for

Case 3:06-cv-07026-EDL Document 38 Filed 06/19/2007 Page 9 of 12

1 further distribution and resale to the Plaintiffs.

2 34. To the extent that the MAPP gas cylinder at issue is
3 held to have caused injuries and damages to Andrew Shalaby and
4 Sonia Dunn-Ruiz, which Defendant/Third Party Plaintiff expressly
5 denies, Third Party Defendants, Western and Worthington, are
6 liable for those injuries as a result of the manufacture and sale
7 of those MAPP gas cylinders to Defendant/Third Party Plaintiff for
8 further distribution and resale.

9 35. Because the cylinder product was discarded well before
10 any lawsuit or involvement of the Defendant/Third Party Plaintiff,
11 there is no way to discover whether Western or Worthington
12 manufactured the cylinder at issue.

13 36. Because it is certain that the manufacturer of the
14 cylinder at issue was either Western or Worthington, both Western
15 and Worthington owe indemnity to the Defendant/Third Party
16 Plaintiff for any alleged harm caused by the cylinder.

17 37. Thus, as a result of their actions, Third Party
18 Defendants, Western and Worthington, owe a complete common law
19 duty of indemnification to Defendant/Third Party Plaintiff for all
20 damages, costs, expenses and fees associated with the Shalaby
21 litigation.

22 FOURTH CLAIM - THIRD PARTY BENEFICIARY

23 38. Defendant/Third Party Plaintiff incorporates by
24 reference the allegations in Paragraphs 1 through 37 of this
25 Complaint as if fully rewritten herein.

26 39. Defendant/Third Party Plaintiff is an intended third
27 party beneficiary of the contract between Western and Worthington
28 for the sale of the cylinder business in September 2004, wherein

Case 3:06-cv-07026-EDL Document 38 Filed 06/19/2007 Page 10 of 12

1 an express method was provided for determining which manufacturer
2 is responsible for a cylinder when it cannot be determined by
3 serial number or other reliable information.

4 40. As set forth in the First Claim, both Third Party
5 Defendants, Western and Worthington, separately contracted with
6 Defendant/Third Party Plaintiff, Bernzomatic, to defend and
7 indemnify Bernzomatic against claims involving cylinders
8 manufactured by each of them.

9 41. One purpose of the contractual provision to identify a
10 cylinder manufacturer in the absence of a serial number or other
11 reliable information is to insure that at least one of the
12 manufacturers will take responsibility for the manufacture of the
13 cylinder.

14 42. The identification of the cylinder manufacturer may be
15 necessary to enforce Defendant/Third Party Plaintiff Bernzomatic's
16 rights to a defense and indemnification as set forth in the First,
17 Second and Third Claims.

18 FIFTH CLAIM - ESTOPPEL

19 43. Defendant/Third Party Plaintiff incorporates by
20 reference the allegations in Paragraph 1 through 42 as if fully
21 rewritten herein.

22 44. Given the allegations in the Shalaby litigation that a
23 Bernzomatic-branded MAPP gas cylinder caused Plaintiff's injuries,
24 it is undisputed that either Western or Worthington manufactured
25 the MAPP gas cylinder.

26 45. If Plaintiffs are able to maintain an action against
27 Defendant/Third Party Plaintiff Bernzomatic for injuries, Western
28 and Worthington are estopped from denying responsibility for the

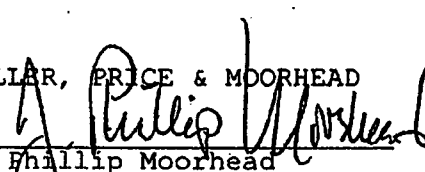
Case 3:06-cv-07026-EDL Document 38 Filed 06/19/2007 Page 11 of 12

1 manufacture, sale and distribution of the Bernzomatic-branded MAPP
2 gas cylinder as it would lead to an unjust result.

3 WHEREFORE, Defendant/Third Party Plaintiff demands judgment
4 in its favor and against both Western and Worthington on all
5 counts for the full amount of all defense costs and any liability
6 or settlement in the Shalaby litigation, together with attorneys'
7 fees, costs, expenses and any other relief the Court deems
8 equitable and just.

9 DATED: June 19, 2007

KELLAR, PRICE & MOORHEAD


10 J. Phillip Moorhead
11 Attorneys for Defendant/Third
12 Party Plaintiff, BERNZOMATIC, an
13 Unincorporated Division of Irwin
14 Industrial Tool Company, and
15 Defendant, THE HOME DEPOT, INC.
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Case 3:06-cv-07026-EDL Document 38 Filed 06/19/2007 Page 12 of 12

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 Andrew Shalaby v. Bernzomatic/Home Depot, Inc.
4 CASE NO. C 06 7026 CW

5 PROOF OF SERVICE

6 I am employed in the county of Los Angeles, State of
7 California. I am over the age of 18 and not a party to the within
8 action; my business address is 229 Avenue "I", Second Floor,
9 Redondo Beach, California 90277.

10 On June 19, 2007, I served the foregoing document described as
11 **THIRD PARTY COMPLAINT** on all interested parties in this action as
12 set forth below:

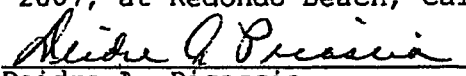
13 Mark D. Epstein
14 Alborg, Veiluva & Epstein LLP
15 200 Pringle Avenue, Suite 410
16 Walnut Creek, CA 94596
17 (925) 939-9880 FAX (925) 939-9915
18 (Attorneys for Plaintiffs, Andrew Shalaby and Sonia Dunn-Ruiz)

19 FACSIMILE - by use of facsimile machine telephone number
20 (310)540-8480, I served a copy of the within document, to the by
21 facsimile numbers set forth above. The facsimile machine I used
22 complied with California Rules of Court, Rule 2004, and no error
23 was reported by the machine. Pursuant to California Rules of
24 Court, Rule 2006(d), I caused the machine to print a transmission
25 record of the transmission, a copy of which is attached to this
26 Declaration.

27 MAIL - I caused such envelope with postage thereon fully
28 prepaid to be placed in the United States mail at Redondo Beach,
California. I am "readily familiar" with the firm's practice of
collection and processing correspondence for mailing. Under that
practice it would be deposited with the U.S. Postal Service that
same day with postage thereon fully prepaid at Redondo Beach,
California, in the ordinary course of business. I am aware that on
motion of the party served, service is presumed invalid if postal
cancellation date or postage meter date is more than one day after
date of deposit for mailing in affidavit.

FEDERAL - I declare under penalty of perjury that the
foregoing is true and correct, and that I am employed in the office
of a member of the Bar of this Court at whose direction the service
was made.

Executed on June 19, 2007, at Redondo Beach, California.


Deidre A. Picascia

1 J. Phillip Moorhead, Esq. (SBN 99445)
KELLER, PRICE & MOORHEAD
2 229 Avenue I, Second Floor
Redondo Beach, California 90277-5600
3 Telephone: (310) 540-1332

4 Attorneys for Defendants, IRWIN INDUSTRIAL TOOL COMPANY, INC. and
5 HOME DEPOT, INC.

6
7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 ANDREW SHALABY, an individual,) CASE NO. C 06 7026 EDL
and SONIA DUNN-RUIZ, an)
12 individual,) Magistrate Judge Elizabeth D.
13) LaPorte
Plaintiffs,)
14) STIPULATION AND ORDER
v.)
15)
IRWIN INDUSTRIAL TOOL COMPANY,)
16 INC., THE HOME DEPOT, INC.,)
and DOES 2 through 100,)
17 inclusive,)
18 Defendants.)
_____)

19
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21
22
23 IT IS HEREBY STIPULATED and agreed, by and between counsel
24 for Plaintiffs (Andrew Shalaby and Sonia Dunn-Ruiz), counsel for
25 Defendants and Third Party Plaintiff (The Home Depot, Inc. and
26 Bernzomatic), and counsel for Third Party Defendant (Western
27 Industries, Inc.), as follows:

28 / / /

1 1. WHEREAS, Western Industries, Inc. made an initial
2 appearance in this case on July 16, 2007 by filing a motion to
3 strike Bernzomatic's third party complaint; and

4
5 2. WHEREAS, Worthington Cylinder Corporation has been named
6 and served with the third party complaint, but does not anticipate
7 making a formal appearance in the action until on or about
8 July 31, 2007; and

9
10 3. WHEREAS, the Court has previously ordered the parties to
11 complete mediation on or before July 25, 2007; and

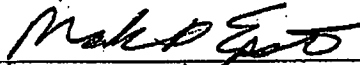
12
13 4. WHEREAS, counsel for all present and anticipated parties
14 to this litigation concur that a meaningful mediation cannot be
15 completed until both third party defendants have appeared in the
16 action and completed sufficient investigation and discovery to
17 effectively discuss the disposition of this case through
18 mediation;

19
20 IT IS HEREBY STIPULATED AND AGREED, by and between the
21 existing parties to this litigation, that the mediation completion
22 date should be postponed and continued to a date suitable to the
23 Court's calendar on or about October 26, 2007, that all parties
24 respectfully request the Court to enter an order in conformance
25 with this Stipulation, and that all parties respectfully request
26 that the Court schedule a case management conference at the
27 Court's convenience within the next 45 days where the parties can
28 advise the Court of the status of the case and discuss the

1 rescheduling of discovery cut-offs, motion cut-offs, trial dates,
2 etc.

3 DATED: July 17, 2007

ALBORG, VEILUVA & EPSTEIN LLP

4 
5 Mark D. Epstein
6 Attorneys for Plaintiffs
7 ANDREW SHALABY and SONIA DUNN-RUIZ

8 DATED: July , 2007

MCCORMICK, BARSTOW SHEPPARD, ET AL.

9 Lowell Carruth
10 Attorneys for Third Party Defendant
11 WESTERN INDUSTRIES, INC.

12 DATED: July , 2007

KELLER, PRICE & MOORHEAD

13 J. Phillip Moorhead
14 Attorneys for Defendants and Third
15 Party Plaintiff
16 HOME DEPOT, INC. and BERNZOMATIC

17 ORDER

18 GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the
19 mediation completion date in this case is postponed and continued
20 to October 26, 2007, and that the Court will notify all parties of
21 a case management conference within the next 45 days.

22 DATED:

23 Elizabeth D. LaPorte
24 Magistrate Judge
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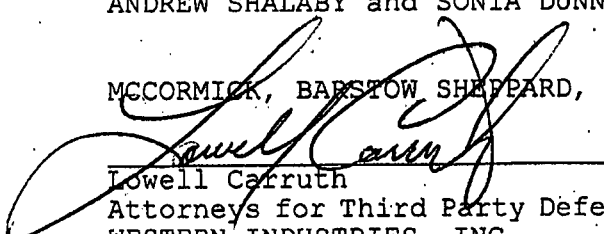
3 DATED: July , 2007

ALBORG, VEILUVA & EPSTEIN LLP

4
5 Mark D. Epstein
Attorneys for Plaintiffs
6 ANDREW SHALABY and SONIA DUNN-RUIZ

7 DATED: July 18, 2007

MCCORMICK, BARSTOW SHEPARD, ET AL.

8
9 
Lowell Carruth
Attorneys for Third Party Defendant
10 WESTERN INDUSTRIES, INC.

11 DATED: July , 2007

KELLER, PRICE & MOORHEAD

12
13 J. Phillip Moorhead
Attorneys for Defendants and Third
14 Party Plaintiff
HOME DEPOT, INC. and BERNZOMATIC

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Magistrate Judge
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ALBORG, VEILUVA & EPSTEIN LLP

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5 Mark D. Epstein
6 Attorneys for Plaintiffs
ANDREW SHALABY and SONIA DUNN-RUIZ

7 DATED: July , 2007

MCCORMICK, BARSTOW SHEPPARD, ET AL.

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9 Lowell Carruth
10 Attorneys for Third Party Defendant
WESTERN INDUSTRIES, INC.

11 DATED: July 17 , 2007

KELLER, PRICE & MOORHEAD

12 J. Phillip Moorhead
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14 Party Plaintiff
HOME DEPOT, INC. and BERNZOMATIC

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23 Elizabeth D. LaPorte
24 Magistrate Judge
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28

1 J. Phillip Moorhead, Esq. (SBN 99445)
KELLER, PRICE & MOORHEAD
2 229 Avenue I, Second Floor
Redondo Beach, California 90277-5600
3 Telephone: (310) 540-1332

4 Attorneys for Defendants, IRWIN INDUSTRIAL TOOL COMPANY, INC. and
5 HOME DEPOT, INC.

6
7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

| | | |
|----|----------------------------------|-------------------------------|
| 11 | ANDREW SHALABY, an individual,) | CASE NO. C 06 7026 EDL |
| 12 | and SONIA DUNN-RUIZ, an) | Magistrate Judge Elizabeth D. |
| 12 | individual,) | LaPorte |
| 13 | Plaintiffs,) | |
| 14 | v.) | STIPULATION AND ORDER |
| 15 | IRWIN INDUSTRIAL TOOL COMPANY,) | |
| 16 | INC., THE HOME DEPOT, INC.,) | |
| 16 | and DOES 2 through 100,) | |
| 17 | inclusive,) | |
| 17 | Defendants.) | |
| 18 | _____) | |

19
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24 for Plaintiffs (Andrew Shalaby and Sonia Dunn-Ruiz), counsel for
25 Defendants and Third Party Plaintiff (The Home Depot, Inc. and
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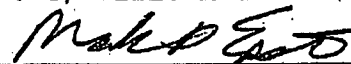
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28 advise the Court of the status of the case and discuss the

1 rescheduling of discovery cut-offs, motion cut-offs, trial dates,
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3 DATED: July 17, 2007

ALBORG, VEILUVA & EPSTEIN LLP

4 
5 Mark D. Epstein
6 Attorneys for Plaintiffs
7 ANDREW SHALABY and SONIA DUNN-RUIZ

8 DATED: July , 2007

MCCORMICK, BARSTOW SHEPPARD, ET AL.

9 Lowell Carruth
10 Attorneys for Third Party Defendant
11 WESTERN INDUSTRIES, INC.

12 DATED: July , 2007

KELLER, PRICE & MOORHEAD

13 J. Phillip Moorhead
14 Attorneys for Defendants and Third
15 Party Plaintiff
16 HOME DEPOT, INC. and BERNZOMATIC

17 ORDER

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22 DATED:

23 Elizabeth D. LaPorte
24 Magistrate Judge
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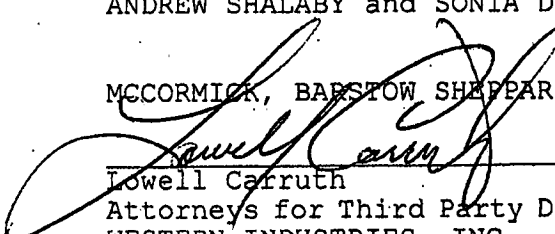
3 DATED: July , 2007

ALBORG, VEILUVA & EPSTEIN LLP

4
5 Mark D. Epstein
6 Attorneys for Plaintiffs
ANDREW SHALABY and SONIA DUNN-RUIZ

7 DATED: July 18, 2007

MCCORMICK, BARSTOW SHEPARD, ET AL.

8
9 
10 Lowell Carruth
Attorneys for Third Party Defendant
WESTERN INDUSTRIES, INC.

11 DATED: July , 2007

KELLER, PRICE & MOORHEAD

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15 Party Plaintiff
HOME DEPOT, INC. and BERNZOMATIC

16 ORDER

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21
22 DATED:

23 Elizabeth D. LaPorte
24 Magistrate Judge
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3 DATED: July , 2007

ALBORG, VEILUVA & EPSTEIN LLP

4
5 Mark D. Epstein
6 Attorneys for Plaintiffs
ANDREW SHALABY and SONIA DUNN-RUIZ

7 DATED: July , 2007

MCCORMICK, BARSTOW SHEPPARD, ET AL.

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9 Lowell Carruth
10 Attorneys for Third Party Defendant
WESTERN INDUSTRIES, INC.

11 DATED: July 17 , 2007

KELLER, PRICE & MOORHEAD

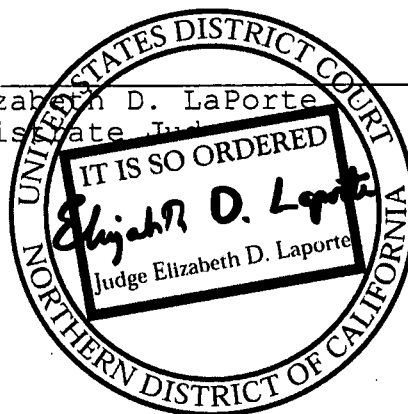
12
13 J. Phillip Moorhead
14 Attorneys for Defendants and Third
15 Party Plaintiff
HOME DEPOT, INC. and BERNZOMATIC

16 ORDER

17 GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the
18 mediation completion date in this case is postponed and continued
19 to October 26, 2007, and that the Court will ~~notify all parties of~~ **hold a case management conference**
20 **on September 11, 2007 at 3:00 p.m. An updated joint case management conference statement shall**
21 ~~a case management conference within the next 45 days.~~
22 **be filed no later than September 4, 2007.**

22 DATED: July 23, 2007

23 Elizabeth D. LaPorte
24 Magistrate Judge



1 Lowell T. Carruth, # 034065
2 McCormick, Barstow, Sheppard,
3 Wayte & Carruth LLP
4 P.O. Box 28912
5 5 River Park Place East
6 Fresno, CA 93720-1501
7 Telephone: (559) 433-1300
8 Facsimile: (559) 433-2300

(SPACE BELOW FOR FILING STAMP ONLY)

9 Attorneys for Third-Party Defendant
10 WESTERN INDUSTRIES, INC.

11 UNITED STATES DISTRICT COURT
12
13 NORTHERN DISTRICT OF CALIFORNIA

14 ANDREW SHALABY, an individual, and
15 SONIA DUNN-RUIZ, an individual,

16 Plaintiffs,

17 v.

18 IRWIN INDUSTRIAL TOOL
19 COMPANY, THE HOME DEPOT, INC.,
20 and DOES 2 through 100, inclusive,

21 Defendants.

Case No. C 06-07026 EDL

**DECLINATION TO PROCEED BEFORE A
MAGISTRATE JUDGE AND REQUEST
FOR REASSIGNMENT TO A UNITED
STATES DISTRICT JUDGE**

Judge: Elizabeth D. LaPorte

22 BERNZOMATIC,

23 Cross-Complainant,

24 v.

25 WESTERN INDUSTRIES, INC.,
26 WORTHINGTON INDUSTRIES, AND
27 ROES 2 through 100, inclusive,

28 Cross-Defendants.

29 The undersigned party hereby declines to consent to the assignment of this case to a
30 United States Magistrate Judge for trial and disposition and hereby requests the reassignment of
31 this case to a United States District Judge.

32 ///

1 Dated: August 9, 2007

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

2
3
4 By: /s/ Lowell T. Carruth

Lowell T. Carruth
Attorneys for Third-Party Defendant
WESTERN INDUSTRIES, INC.

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6 03664/00161-1126652.v1
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANDREW SHALABY, et al.,

Plaintiffs,

v.

NEWELL RUBBERMAID, INC., et al.,

Defendants.

No. C-06-07026 EDL

NOTICE OF IMPENDING
REASSIGNMENT TO A UNITED
STATES DISTRICT COURT JUDGE

The Clerk of this Court will now randomly reassign this case to a United States District Judge because either:

XX (1) One or more of the parties has requested reassignment to a United States District Judge or has not consented to the jurisdiction of a United States Magistrate Judge, or

(2) One or more of the parties has sought a type of judicial action (e.g., a temporary restraining order) that a United States Magistrate Judge may not take without the consent of all parties, the necessary consents have not been secured, and time is of the essence.

The motion hearing and the further case management conference set for September 11, 2007 on Magistrate Judge Laporte's calendar will NOT be held.

Dated: August 10, 2007

Richard W. Wieking, Clerk
United States District Court



By: Lili M. Harrell
Deputy Clerk

UNITED STATES DISTRICT COURT
Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

www.cand.uscourts.gov

Richard W. Wieking
Clerk

General Court Number
415.522.2000

August 13, 2007

CASE NUMBER: CV 06-07026 EDL

CASE TITLE: SHALABY ET AL-v-NEWELL RUBBERMAID, INC. ET AL

REASSIGNMENT ORDER

GOOD CAUSE APPEARING THEREFOR,

IT IS ORDERED that this case is reassigned to the **San Francisco** division.

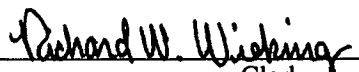
Honorable MARTIN J. JENKINS for all further proceedings.

Counsel are instructed that all future filings shall bear the initials **MJJ** immediately
after the case number.

ALL MATTERS PRESENTLY SCHEDULED FOR HEARING ARE VACATED AND
SHOULD BE RENOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THE CASE
HAS BEEN REASSIGNED.

Date: 8/13/07

FOR THE EXECUTIVE COMMITTEE:


Clerk

NEW CASE FILE CLERK:

Copies to: Courtroom Deputies
Log Book Noted

Special Projects
Entered in Computer 8/13/07AS

CASE SYSTEMS ADMINISTRATOR:
Copies to: All Counsel

Transferor CSA